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17 **UNITED STATES DISTRICT COURT**  
 18 **NORTHERN DISTRICT OF CALIFORNIA**  
 19 **SAN JOSE DIVISION**

20 RED HAT, INC.,

21 Plaintiff,

22 v.

23 VIRTAMOVE CORP.,

24 Defendant.

Case No. 5:24-cv-04740-PCP

**PLAINTIFF VIRTAMOVE'S REPLY IN**  
**SUPPORT OF ITS MOTION TO**  
**DISMISS RED HAT'S COMPLAINT**  
**UNDER FED. R. CIV. P. 12(b)(1) AND**  
**12(b)(2)**

Jury Trial Demanded

Date: Thursday, Dec. 11, 2024  
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 Location: Courtroom 8, 4th Floor  
 Judge: Hon. P. Casey Pitts

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## I. INTRODUCTION

Red Hat’s opposition further confirms this Court lacks both subject matter jurisdiction over this declaratory judgment action and personal jurisdiction over VirtaMove. This case should be dismissed in its entirety for either of these two independently sufficient reasons. And it should be dismissed without leave to amend because the evidence shows that Red Hat simply cannot plead facts to support this Court’s exercise of jurisdiction.

For there to be subject matter jurisdiction over a patent declaratory judgment action seeking a declaration of non-infringement, the patentee-defendant must have directed some “affirmative act” *toward* the declaratory judgment plaintiff. The uncontroverted evidence shows that VirtaMove never contacted Red Hat concerning its patents or Red Hat’s products. And although certain actions by the patentee other than “direct communication” with the declaratory judgment plaintiff may give rise to an “active controversy” between the parties, VirtaMove took no such actions here. The evidence shows that VirtaMove has not sued or threatened to sue any of Red Hat’s customers based on their use of any Red Hat product, and has not otherwise provided any indication that it believes that any of Red Hat’s products infringe. The only VirtaMove “actions” to which Red Hat points are lawsuits against *different companies* offering *different products*. Red Hat does not (and cannot) plead any requisite “affirmative act” that VirtaMove directed toward it or its products because, as the evidence shows, none exists. Red Hat cannot maintain this suit based on a purely subjective and speculative fear that VirtaMove may bring suit against it at some indeterminate time in the future. At bottom, because there is no “active controversy” between the parties to this declaratory judgment action, the Court lacks subject matter jurisdiction over it.

As for personal jurisdiction, Red Hat only pled general or “all-purpose” jurisdiction in its complaint. It has now abandoned that ill-founded theory, and for the first time in its opposition, alleges that this Court has specific personal jurisdiction over VirtaMove. Its specific jurisdiction theory fares no better. In the context of a patent declaratory judgment action, Federal Circuit precedent is clear that only *patent enforcement activities* that occur *in this forum* are relevant to the specific personal jurisdiction analysis. VirtaMove’s *commercialization efforts*, as well as patent enforcement activities *in different fora*, are simply irrelevant. Critically, Red Hat points to no

1 patent enforcement or patent licensing activities that VirtaMove has undertaken in this forum, and  
 2 the evidence confirms there are none. Red Hat does not (and cannot) plead facts sufficient to  
 3 establish that this Court has personal jurisdiction over VirtaMove.

## 4 **II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE**

5 Red Hat claims that because its OpenShift product allegedly incorporates certain third-  
 6 party technology referred to as Docker and Kubernetes, and VirtaMove has initiated patent  
 7 infringement litigation in Texas against four *different companies* alleging patent infringement by  
 8 *different products* that incorporate that third-party technology, this “creates a justiciable  
 9 controversy” between VirtaMove and Red Hat under the Declaratory Judgment Act. Dkt. No. 34  
 10 (Opp’n) at 4-5. This argument fails as a matter of law because VirtaMove has not directed any  
 11 “affirmative act” toward *Red Hat*, as the law requires.

12 VirtaMove has neither contacted Red Hat concerning any of VirtaMove’s patents (Dkt. No.  
 13 31-1 (Cameron Op. Decl.) ¶¶2-3) nor otherwise alleged that OpenShift or any other Red Hat  
 14 product infringes any VirtaMove patent (Cameron Reply Decl.<sup>1</sup> ¶6; *see also* Dkt. Nos. 1-1 through  
 15 1-4, 1-9, 1-12). Aside from the four cases in Texas (“Texas Actions”), VirtaMove has not brought  
 16 any other patent litigation. Cameron Reply Decl. ¶¶4-5. And in the Texas Actions, VirtaMove has  
 17 only accused Amazon, Google, HPE, and IBM (the “Texas Defendants”) of infringing by way of  
 18 each defendant’s own products. *See* Dkt. Nos. 1-1 through 1-4, 1-9, 1-12. VirtaMove has not  
 19 accused any defendant of infringing by using OpenShift or any other of Red Hat’s products.  
 20 VirtaMove has likewise not sent any correspondence or made any other communications to any  
 21 entity other than the Texas Defendants alleging infringement of a VirtaMove patent, let alone  
 22 infringement based on any Red Hat products. *Id.* ¶6. Simply put, VirtaMove has not engaged in  
 23 any conduct indicating or implying that it believes that any Red Hat product infringes its patents.

24 As explained in detail in VirtaMove’s opening brief (Dkt. No. 31 (Mot.) at 4-10), the  
 25 Federal Circuit has made clear that there cannot be an “actual controversy” under the Declaratory  
 26

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27 <sup>1</sup> Citations to “Cameron Reply Decl.” are to the concurrently filed Declaration of Susan Cameron  
 28 in Support of Plaintiff VirtaMove’s Reply in Support of its Motion to Dismiss Red Hat’s  
 Complaint Under Fed. R. Civ. P. 12(b)(1) and 12(b)(2).

Judgment Act between a patentee and a DJ plaintiff unless the patentee directs “some affirmative act” toward the DJ plaintiff. *See, e.g., Ass’n for Molecular Pathology v. USPTO*, 689 F.3d 1303, 1323 (Fed. Cir. 2012) (“*Myriad*”), *reversed in part on other grounds*, 133 S. Ct. 2107 (2013). Courts in this district have held the same. *See, e.g., Proofpoint, Inc. v. Innova Patent Licensing, LLC*, No. 5:11-cv-02288-LHK, 2011 WL 4915847, at \*3 (N.D. Cal. Oct. 17, 2011) (“In order to establish an ‘actual controversy’ based on enforcement activity by a patentee, the pleadings must show that the patentee engaged in ***affirmative acts directed specifically at the party seeking declaratory judgment.***”) (emphasis added).

And none of the authorities Red Hat cites hold otherwise. *See* Opp’n at 2-3, 5-9. Rather, a common theme among of many of those cases is that “***direct communication*** between the patentee and declaratory judgment plaintiff ***is not necessary to confer standing.***” *Id.* at 2 (quoting *Arris Grp., Inc. v. British Telecommc’ns PLC*, 639 F.3d 1368, 1378 (Fed. Cir. 2011)) (emphasis in Opp’n). VirtaMove does not dispute that basic principle, as there are ways other than “direct communication” by which a patentee can direct “affirmative acts” toward a potential infringer. But VirtaMove has not engaged in any such actions toward Red Hat.

Red Hat’s cited authorities are instructive of actions by a patentee that can give rise to DJ jurisdiction other than “direct communications.” For example, in *UCP International Co. v. Balsam Brands Inc.*, the Federal Circuit affirmed a district court’s exercise of declaratory judgment jurisdiction because the patentee sued one of DJ plaintiff UCP’s customers, and over the course of that litigation the patentee “identified UCP’s [artificial holiday] trees as the accused product, ... submitted interrogatory responses accusing UCP of making the infringing trees, and submitted claim charts comparing its patented trees to UCP’s trees.” 787 F. App’x 691, 699 (Fed. Cir. 2019). Indeed, the *UCP* panel recognized that the Federal Circuit “previously affirmed a district court’s determination that it had declaratory judgment jurisdiction where a patent holder sued a declaratory judgment plaintiff’s customers in a prior suit, and submitted claim charts in that suit implying that the declaratory judgment plaintiff could liable for indirect infringement.” *Id.* (citing *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 905 (Fed. Cir. 2014)); *see also ARRIS*, 639 F.3d at 1376-79 (holding there was DJ jurisdiction because the patentee accused DJ plaintiff ARRIS’ customer



of infringing by “explicitly and repeatedly singled out ARRIS’ products used in [the customer’s] network to support its infringement contentions”);<sup>2</sup> *Microsoft Corp. v. SynKloud Techs., LLC*, 484 F. Supp. 3d 171, 185-87 (D. Del. 2020) (allegations by patentee against Microsoft’s customer sufficient to confer DJ jurisdiction where the patentee “repeatedly singled out Microsoft’s OneDrive product used by [Microsoft’s customer] to support its infringement contentions”); *Microsoft Corp. v. GeoTag, Inc.*, No. 11-cv-175-RGA, 2014 WL 4312167, at \*2 (D. Del. Aug. 29, 2014) (allegations by patentee against DJ plaintiffs’ customers rooted in DJ plaintiffs’ products sufficient to confer DJ jurisdiction). Here, as explained above, VirtaMove has not sued or threatened to sue any of Red Hat’s customers based on their use of any Red Hat product. Cameron Reply Decl. ¶¶4-6. Nor has it made any infringement allegations claiming that any of Red Hat’s products infringe either patent-at-issue or any VirtaMove patent. *See* Dkt. Nos. 1-1 through 1-4, 1-9, 1-12; Cameron Reply Decl. ¶6.

Similarly, in *In re Mobile Telecommunications Technologies, LLC* (“*MTel*”), declaratory judgment jurisdiction existed because “*MTel*’s complaints in the Texas Actions expressly identify [DJ Plaintiffs] ARRIS and Ubee products as ‘examples’ of equipment that directly infringe the asserted patents.” 247 F. Supp. 3d 456, 461 (D. Del. 2017). The Delaware court recognized that “[s]uch repeated references identifying DJ Plaintiffs’ products as infringing may give rise to a ‘substantial controversy’ about whether those products infringe the patents-in-suit.” *Id.* And contrary to Red Hat’s implication to the contrary (Opp’n at 7), the *MTel* court did not hold that *MTel*’s lawsuits against other suppliers that sold equipment implementing the same IEEE 802.11 Wi-Fi standard conferred jurisdiction on its own, but rather was simply a “pertinent consideration” further bolstering the jurisdictional holding in view of *MTel*’s “repeated references” to the DJ Plaintiffs’ products. 247 F. Supp. 3d at 463. Moreover, this case and VirtaMove’s Texas Actions are also distinguishable from those in *MTel* because they do not involve standardized telecommunications technology. Rather, VirtaMove’s cases involve different virtual

<sup>2</sup> *Arris* is further distinguishable from the instant case because “*Arris* was directly and substantially involved in [the] infringement and licensing negotiations,” and the patentee “repeatedly communicated [its] accusation directly to *Arris* during the course of a protracted negotiation process.” 639 F.3d at 1378-79, 1381.

1 containerization products, and although each incorporates aspects of the open-source Docker and  
 2 Kubernetes solutions, VirtaMove’s infringement allegations focus on specific details of those  
 3 products, including how the products are configured in regard to the servers and operating systems  
 4 utilized. *See* Mot. at 6 n.3; Dkt. No. 1-12 at 9.

5 Red Hat’s additional cited authority is, at best, equally inapposite. For example, Red Hat  
 6 alleges that in *Micron Technology, Inc. v. MOSAID Technologies, Inc.*, the Federal Circuit  
 7 “revers[ed an] order granting motion to dismiss for lack of subject matter jurisdiction because  
 8 ‘[declaratory judgment plaintiff] watched [defendant] sue each of the other leading’ suppliers of  
 9 the accused technology.” Opp’n at 6 (quoting *Micron*, 518 F.3d 897, 901 (Fed. Cir. 2008)) (last  
 10 two alterations in Opp’n). Red Hat’s clear implication is that the *Micron* panel found DJ  
 11 jurisdiction *without* MOSAID having previously directed any communication or any other  
 12 “affirmative act” toward Micron. However, examination of the full sentence from *Micron*, which  
 13 Red Hat only partially quotes, makes clear the *opposite* is true: “Beginning in 2001, ***after receiving***  
 14 ***several threats itself***, Micron watched MOSAID sue each of the other leading DRAM  
 15 manufacturers.” *Micron*, 518 F.3d at 901 (emphasis added).

16 Thus, *Micron* plainly does not stand for the proposition that suing other entities for  
 17 infringing based on other products can, standing alone, create DJ jurisdiction. Instead, the panel  
 18 relied on the patentee’s litigation activity against other DRAM companies simply to reject the  
 19 notion that there was no controversy remaining between Micron and MOSAID due to the lapse in  
 20 time between the four letters MOSAID sent to Micron and the filing of the DJ action; it did not  
 21 hold that the other litigation activity in and of itself could convey jurisdiction. *Id.* Moreover, the  
 22 patentee brought suit against Micron *the day after* Micron filed the DJ action, further confirming  
 23 an active controversy between the parties. *See id.* at 901-02 (“[T]he parties in this dispute are really  
 24 just contesting their location and right to choose the forum for their inevitable suit.”). None of  
 25 these facts are present here.

26 And the facts of both *Danisco U.S. Inc. v. Novozymes A/S* and *Arkema Inc. v. Honeywell*  
 27 *International, Inc.* are even farther removed from the facts of this case. In *Danisco*, the issue on  
 28 appeal was a narrow one—whether “affirmative acts” by a patentee that occur *before* a patent

1 issues can give rise to DJ jurisdiction. 744 F.3d 1325, 1331-32 (Fed. Cir. 2014). The panel rejected  
 2 a distinction between pre- and post-issuance conduct as inconsistent with both Supreme Court and  
 3 Federal Circuit precedent, particularly given the extensive actions taken by patentee Novozymes  
 4 to make it known that it believed DJ plaintiff Danisco infringed its soon-to-issue patent. *Id.* Among  
 5 other interactions between the parties, Novozymes filed an “interference” action with the USPTO  
 6 contending that it, rather than Danisco, was entitled to a patent on a certain enzyme that was  
 7 undisputedly an active ingredient Danisco’s RSL products. *Id.* at 1328. And when it lost the  
 8 interference proceeding, Novozymes voluntarily filed public comments with the USPTO alleging  
 9 the Office’s findings were incorrect and “that it refused to ‘acquiesce’ to or otherwise be ‘estopped’  
 10 by what it deemed to be the [patent] examiner’s erroneous and ‘overly narrow’ view of  
 11 Novozymes’s claim scope.” *Id.* at 1329. The panel held that this “record shows that Novozymes  
 12 sought [the patent-at-issue] because it believed Danisco’s products would infringe once issued”  
 13 and that “Novozymes has insisted on multiple occasions that [the patent-at-issue] reads on ... the  
 14 active compound in Danisco’s RSL products.” *Id.* at 1331. The *Danisco* court thus held that the  
 15 parties “have adverse legal interests over a dispute of sufficient reality” such that DJ jurisdiction  
 16 is appropriate. *Id.* No remotely similar facts exist here.

17 And in *Arkema*, patentee Honeywell sued Arkema in Europe for infringement of a patent  
 18 directed to a certain automotive refrigerant, “1234yf.” 706 F.3d 1351, 1355 (Fed. Cir. 2013).  
 19 Arkema filed a declaratory judgment action in the United States seeking a declaration that it does  
 20 not infringe two of Honeywell’s U.S. patents directed to 1234yf and that those patents are invalid.  
 21 *Id.* Honeywell did not challenge jurisdiction at this juncture, but rather counterclaimed, alleging  
 22 infringement of those patents by Arkema. *Id.* The appeal arose from the district court’s later denial  
 23 of Arkema’s motion to amend to add declaratory judgment causes of action concerning two  
 24 additional patents related to the same technology that Honeywell obtained while the suit was  
 25 pending. *Id.* The Federal Circuit reversed, holding that there was an active controversy between  
 26 the parties because *those same parties* were already involved in litigation over patents covering  
 27 the same 1234yf refrigerant. *Id.* at 1357-59. In these unique circumstances, “specific accusations  
 28 against either the potential direct infringers or Arkema” were not necessary. *Id.* at 1357. Again,

1 there are of course no similar facts here.

2 Furthermore, Red Hat mischaracterizes the authority VirtaMove cites in its motion. For  
 3 example, Red Hat claims that in *Myriad*, the Federal Circuit found a lack of subject matter  
 4 jurisdiction in part “because ‘Plaintiffs ... failed to allege *any* ‘affirmative acts’ by [patentee]  
 5 within the past ten years relating to the patents in suit.’” Opp’n at 9 (quoting *Myriad*, 689 F.3d at  
 6 1319). But this is a quotation of *rejected* argument. The Federal Circuit in fact found there was DJ  
 7 jurisdiction as to one of the plaintiffs, despite the lapse in time between the patentee’s actions and  
 8 the DJ suit, because he alleged both “affirmative patent enforcement actions directed at [him] by  
 9 *Myriad*” and “an intention to actually and immediately engage in allegedly infringing ...  
 10 activities.” *Myriad*, 689 F.3d at 1319. The panel then *faulted* the district court for “*fail[ing] to*  
 11 *limit its jurisdictional holding to affirmative acts directed at specific Plaintiffs*, erroneously  
 12 holding all Plaintiffs had standing based on the widespread understanding that one may engage in  
 13 BRCA½ testing at risk of being sued by *Myriad*.” *Id.* at 1323 (cleaned up, emphasis added); *see*  
 14 Mot. at 7.

15 Here, Red Hat merely alleges that it subjectively believes there is a risk VirtaMove will  
 16 sue it for patent infringement despite no affirmative acts directed toward it. *See, e.g.*, Dkt. No. 1  
 17 (Compl.) ¶¶2-4. It would be error for the Court here to hold that there is an “active controversy”  
 18 between VirtaMove and Red Hat here because “a case or controversy must be based on a *real* and  
 19 *immediate* injury or threat of future injury that is *caused by defendants* [by VirtaMove]—an  
 20 objective standard that cannot be met by a purely subjective or speculative fear of future harm.”  
 21 *Prasco, LLC v. Medicis Pharma. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008). In discussing  
 22 *Prasco*, Red Hat points to an irrelevant patent-marking-related issue. Opp’n at 9. But the main  
 23 thrust behind *Prasco* is that there was no DJ jurisdiction in that case because the patent holder had  
 24 “not accused *Prasco* of infringement or asserted any rights to [its product], nor [did] they take any  
 25 actions which imply such claims”; the patent holder had simply “taken no affirmative actions at  
 26 all related to *Prasco*’s current product.” 537 F.3d at 1340. The same is true here—VirtaMove has  
 27 not directed any affirmative acts towards Red Hat or its products.

28 The Court should therefore dismiss this case in its entirety for lack of subject matter

(declaratory judgment) jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Additionally, the dismissal should be granted *without leave to amend* because amendment would be futile. *See* Mot. at 9-10. Red Hat cannot plead facts to support DJ jurisdiction because the uncontroverted evidence shows that VirtaMove has never contacted Red Hat concerning any of its patents, or otherwise alleged that OpenShift or any other Red Hat product infringes them. Cameron Decl. ¶¶2-3; Cameron Reply Decl. ¶¶5-6. Put simply, Red Hat cannot plead the requisite “affirmative act.”

### III. THIS COURT ALSO LACKS PERSONAL JURISDICTION OVER VIRTAMOVE

#### A. Red Hat concedes VirtaMove is not subject to general personal jurisdiction in this forum.

In the wake of more than a half-century of Supreme Court precedent that entirely disposes of its general jurisdiction theory (*see* Mot. at 10-14), Red Hat concedes that VirtaMove is not subject to general personal jurisdiction in this Court. *See* Opp’n at 1-2, 10-14 (only arguing that there is *specific*, not *general*, personal jurisdiction over VirtaMove). For all of the reasons set forth in VirtaMove’s opening brief, the Court should find that it lacks general jurisdiction over VirtaMove. Mot. at 10-14.

#### B. VirtaMove is likewise not subject to specific personal jurisdiction.

Despite not pleading *specific* personal jurisdiction in its complaint (*see, e.g.*, Compl. ¶10), Red Hat now claims that it has pled facts sufficient to show that this Court has specific jurisdiction over VirtaMove for purposes of this case. Even setting aside Red Hat’s failure to plead specific jurisdiction,<sup>3</sup> it has not (and cannot) plead facts that can support this theory.

“For [specific] personal jurisdiction, the nonresident defendant must have ‘certain minimum contacts with [the forum] such that the maintenance of the suit does not offend

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<sup>3</sup> In a footnote in its opposition, Red Hat “requests the opportunity to submit a sur-reply brief on” specific jurisdiction “to the extent VirtaMove raises new arguments or evidence in its reply brief” on this new theory. Opp’n at 11 n.6. This is not a procedurally proper way to request a sur-reply; if anything, Red Hat should do so under Civil L.R. 7-11. VirtaMove intends to oppose any such request on the basis that Red Hat improperly raised this new, frivolous theory for the first time in its opposition to a motion to dismiss rather than pleading it in the Complaint itself (such that VirtaMove *could not* have addressed specific jurisdiction arguments in its Motion) and because VirtaMove does not believe that further briefing related to Red Hat’s ill-founded DJ complaint would be an efficient use of judicial resources.

1 ‘traditional notions of fair play and substantial justice.’” *New World Int’l, Inc. v. Ford Global*  
 2 *Techs., LLC*, 859 F.3d 1032, 1037 (Fed. Cir. 2017) (quoting *Int’l Shoe Co. v. Wash.*, 326 U.S. 310,  
 3 316 (1945)). “For minimum contacts in the context of specific jurisdiction, the plaintiff must show  
 4 that defendant ‘has purposefully directed his activities at residents of the forum, and [that] the  
 5 litigation results from alleged injuries that arise out of or relate to those activities.’” *Id.* (quoting  
 6 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)) (alteration in original). “If those  
 7 minimum contacts are sufficient, the defendant may point to other factors ‘to determine whether  
 8 the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Id.*  
 9 (quoting *Burger King*, 471 U.S. at 476) (quotation marks omitted).

10 The Federal Circuit has articulated this long-governing Supreme Court precedent “in the  
 11 form of a three-part test: (1) whether the defendant ‘purposefully directed’ its activities at residents  
 12 of the forum; (2) whether the claim ‘arises out of or relates to’ the defendant’s activities with the  
 13 forum; and (3) whether assertion of personal jurisdiction is ‘reasonable and fair.’” *Id.* (quotation  
 14 marks omitted). “The first two factors correspond with the ‘minimum contacts’ prong of the  
 15 *International Shoe* analysis, and the third factor corresponds with the ‘fair play and substantial  
 16 justice’ prong of the analysis.” *Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324 at 1332  
 17 (Fed. Cir. 2008).

18 In an ordinary patent infringement action in which the patentee sues an infringer, specific  
 19 jurisdiction can be established based on “the nature and extent of the commercialization of the  
 20 accused products or services by the defendant in the forum.” *Id.* (citing *Red Wing Shoe Co. v.*  
 21 *Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360 (Fed. Cir. 1998)). “But in the context of an  
 22 action for declaratory judgment of non-infringement ..., the patentee is the defendant, and the  
 23 claim asserted by the plaintiff relates to the ‘wrongful restraint [by the patentee] on the free  
 24 exploitation of non-infringing goods ... [such as] the threat of an infringement suit.” *Id.* (quoting  
 25 *Red Wing Shoe*, 148 F.3d at 1360). “Such a claim ... arises out of or relates to the **activities of the**  
 26 **defendant patentee in enforcing the patent or patents in suit**. The relevant inquiry ... then  
 27 becomes to what extent has the defendant patentee ‘purposefully directed [such enforcement  
 28 activities] at residents of the forum,’ and the extent to which the declaratory judgment claim ‘arises



out of or relates to those activities.” *Id.* at 1332-33 (quoting *Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1363 (Fed. Cir. 2006)) (emphasis added, last alteration in original). Notably, in evaluating litigation brought against forum residents, “patent litigation commenced ***outside*** the forum is not probative of purposeful availment” is therefore irrelevant to the personal jurisdiction analysis. *See, e.g., Autonomy, Inc. v. Adiscov, LLC*, No. 11-cv-00420-SBA, 2011 WL 2175551, at \*4 (N.D. Cal. June 3, 2011). Put simply, “***only enforcement or defense efforts*** related to the patent ***rather than the patentee’s own commercialization efforts*** are to be considered for establishing specific personal jurisdiction in a declaratory judgment action against the patentee.” *Radio Sys. Corp. v. Accession, Inc.*, 638 F.3d 785, 790 (Fed. Cir. 2011) (quoting *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 556 F.3d 1012, 1019 (Fed. Cir. 2009)) (emphases added).

Red Hat cannot demonstrate the “minimum contacts” required for specific jurisdiction under these standards, and it is not a close call. Even taking Red Hat’s pleadings concerning VirtaMove’s “contacts” with California as true,<sup>4</sup> Red Hat’s pleading is fatally flawed because it does not (and cannot) point to ***any*** VirtaMove patent enforcement activities within this forum.

First, Red Hat claims that “in 2013, VirtaMove ‘met with HP representatives in California to discuss and demonstrate [VirtaMove’s] technology’ that ‘VirtaMove claims is covered by’ the Asserted Patents.” Opp’n at 11 (quoting Compl. ¶¶11-13). Red Hat similarly alleges that “[i]n 2015, 2020, and 2021, VirtaMove also ‘met with representatives of Google’ to demonstrate its technology, which was patented at that time.” *Id.* (quoting Compl. ¶14). But these meetings were nothing more than efforts by VirtaMove to commercialize and sell its products; VirtaMove was not seeking to license its patents via these meetings. Cameron Reply Decl. ¶3. And even if the products VirtaMove was attempting to commercialize and sell practiced the patents-at-issue, Federal Circuit precedent is clear that commercialization efforts of patented products do not give

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<sup>4</sup> VirtaMove does not concede that all facts pled by Red Hat in paragraphs 10-20 of the complaint are true, but does not address each of those issues now since it is unnecessary to do so to resolve the personal jurisdiction issue at hand.

1 rise to specific jurisdiction.<sup>5</sup> *See, e.g., Radio Sys.*, 638 F.3d at 790 (holding that the DJ defendant’s  
 2 “attempts to interest Radio Systems in a business transaction ... to commercialize his invention”  
 3 was not sufficient to confer specific jurisdiction); *Avocent*, 552 F.3d at 1336 (“[M]ere evidence of  
 4 sales within the forum of products covered by the relevant patent(s) is insufficient to guarantee  
 5 specific personal jurisdiction over the patentee.”); *see also R S Hughes Co. v. PCP Grp., Inc.*, No.  
 6 09-cv-4846-VRW, 2010 WL 11703642, at \*1, \*4, \*6 (N.D. Cal. Mar. 2, 2010) (Because “personal  
 7 jurisdiction in a declaratory action for non-infringement turns on the jurisdictions to which  
 8 defendant directs its enforcement actions, ... commercialization activities are irrelevant for the  
 9 purposes of establishing specific personal jurisdiction” as they “are aimed at commercialization of  
 10 the patented product, not enforcement or defense-related activities.”) (emphasis in original). It is  
 11 therefore irrelevant to the personal jurisdiction inquiry that VirtaMove may have entered this  
 12 forum to conduct, or has a representative within this forum that conducted, these product-  
 13 commercialization-related meetings.<sup>6</sup>

14 Red Hat also claims that “VirtaMove granted another California company, CloudPhysics,  
 15 ‘an express or implied license to use VirtaMove’s application virtualization patents, including the  
 16 [Asserted Patents].” Opp’n at 12 (quoting Compl. ¶15) (alternation in Opp’n). Red Hat provides  
 17 no evidence that such a license exists, pleading this allegation solely “[o]n information and belief.”  
 18 Compl. ¶15. Red Hat’s allegation is incorrect; VirtaMove has never licensed either patent-at-issue,  
 19

20 <sup>5</sup> Red Hat also alleges that “VirtaMove also maintains or maintained strategic partnerships with  
 21 multiple California companies, including at least HP and CloudPhysics.” Opp’n at 13 (citing  
 22 Compl. ¶¶11, 15). These partnerships involved product commercialization, not patent  
 23 enforcement, and thus are not relevant here for the reasons discussed in this paragraph. *See* Compl.  
 24 ¶¶11, 15; Cameron Reply Decl. ¶¶4-6. Red Hat cites *Agilent Technologies, Inc. v. Elan*  
 25 *Microelectronics Corp.*, No. 04-cv-05385-JW, 2005 WL 3260162, at \*3 (N.D. Cal. Nov. 29, 2005)  
 26 for the proposition that such “partnerships” are in fact relevant to the specific jurisdiction analysis.  
 Opp’n at 13. But *Agilent* has no applicability here because it is **not a declaratory judgment case**,  
 but rather an “ordinary” patent infringement matter. As discussed above, personal jurisdiction  
 considerations are quite difference for those types of cases due the differing nature of the causes  
 of action at issue. *See supra* at 9-10.

27 <sup>6</sup> That VirtaMove may have utilized servers located in California for the operation of its  
 28 commercial product is irrelevant for similar reasons—such use of servers has to do with product  
 commercialization, not patent enforcement. *See* Opp’n at 13 (citing Compl. ¶13).



1 or any of its patents. Cameron Reply Decl. ¶2. Nor has VirtaMove offered a license for either any  
 2 of its patents. *Id.* ¶3. VirtaMove has therefore not “sought to license its patent technology to entities  
 3 in California” (or anywhere). *See* Opp’n at 12-13. Red Hat has no evidentiary basis to support its  
 4 bald assertion that VirtaMove has engaged in “extensive licensing efforts” in this forum (*see id.* 1,  
 5 5), as sworn affidavit evidence is directly in conflict with such an allegation (Cameron Reply Decl.  
 6 ¶¶2-3).

7 Moreover, even if VirtaMove did have a patent license with a California resident, simply  
 8 having such a license may not be sufficient for specific jurisdiction to lie; rather, examination of  
 9 the nature of the license is critical. “For example, a license that establishes no relationship between  
 10 a patent holder and a licensee beyond the payment and receipt of royalty income is not sufficient,  
 11 because a declaratory judgment action does not typically ‘arise from or relate to’ a patent holder’s  
 12 efforts to license or commercialize its patent. On the other hand, a license that obligates the patent  
 13 holder to defend or enforce the patent may be sufficient to establish specific personal jurisdiction,  
 14 because a declaratory judgment action typically arises from a patent holder’s actions to enforce or  
 15 defend its patent in the forum.” *New World*, 859 F.3d at 1039; *see also Adobe Sys. Inc. v. Tejas*  
 16 *Research, LLC*, No. 14-cv-0868-EMC, 2014 WL 4651654, at \*6-7 (N.D. Cal. Sept. 17, 2014)  
 17 (non-exclusive licenses with forum residents that imposed no continuing patent enforcement  
 18 obligations did not give rise to specific jurisdiction). Red Hat does not (and cannot) plead that the  
 19 alleged CloudPhysics license or any other license imposes any such “continuing obligation” on  
 20 VirtaMove because no licenses to the patents-at-issue or any VirtaMove patents exist. Cameron  
 21 Reply Decl. ¶2.

22 To the extent Red Hat is relying on VirtaMove’s Texas Actions against Google and HPE  
 23 (California residents) to establish specific personal jurisdiction (*see* Opp’n at 11), that argument  
 24 fails as well. “[T]he fact that [VirtaMove] has pursued enforcement actions against California  
 25 residents in ... Texas does not support the exercise of personal jurisdiction of [VirtaMove] in  
 26 California.” *Adobe*, 2014 WL 4651654, at \*5; *see also DocuSign, Inc. v. Clark*, No. 21-cv-04785,  
 27 2022 WL 225623, at \*5 (N.D. Cal. Jan. 25, 2022) (“While initiating judicial enforcement of a  
 28 patent supports person jurisdiction, it does so only when the defendant initiates such enforcement

1 within the forum state.”); *Autonomy*, 2011 WL 2175551, at \*4 (“[P]atent litigation commenced  
 2 outside the forum is not probative of purposeful availment.”); *Liberty v. Nouis*, No. 98-cv-3078-  
 3 VRW, 1998 WL 754594, at \*2 (N.D. Cal. Oct. 22, 1998) (“[D]efendant did not subject himself to  
 4 personal jurisdiction in California by filing a lawsuit in Michigan.”). “Nor does such an argument  
 5 make any logical sense. Under [this] theory of personal jurisdiction, a defendant would  
 6 automatically be subject to personal jurisdiction in a forum where it previously sued an entity that  
 7 happened to conduct business in that particular state, even where the lawsuit was filed in an entirely  
 8 different state.” *Juniper Networks, Inc. v. SSL Servs., LLC*, No. 08-cv-5758-SBA, 2009 WL  
 9 3837266, at \*4 (N.D. Cal. Nov. 16, 2009), *aff’d*, 404 F. App’x 499 (Fed. Cir. 2010).

10 Finally, Red Hat alleges that because some of VirtaMove’s attorneys are located in  
 11 California, this somehow supports this Court exercising jurisdiction over VirtaMove. *See* Opp’n  
 12 at 12. Red Hat’s cited authority on this point readily distinguishable. For example, as the Federal  
 13 Circuit aptly explained, in *Electronics for Imaging, Inc. v. Coyle*, 340 F.3d 1344 (Fed. Cir. 2003),  
 14 “the attorney-client relationship [in that case] effectively became an agency relationship in which  
 15 the principal retained agents in the forum state to assist in the enforcement of its patent rights.”  
 16 *Radio Sys.*, 638 F.3d at 791. More specifically, “the patentee in *Electronics for Imaging* hired a  
 17 California attorney to communicate with the California-based plaintiff on the patentee’s behalf”  
 18 “to report on the process of the patentee’s pending application” and to “advise the plaintiff’s  
 19 representatives that the patentee had a number of commercially successful patents and that he had  
 20 previously sued several large companies for patent infringement and won.” *Id.* at 790. The patentee  
 21 there also threatened the DJ plaintiff with litigation unless it paid specific licensing fees. *Id.* at 791.  
 22 And in *Apple Inc. v. VoIP-Pal.com*, not only did the patentee hire multiple California law firms,  
 23 but it also filed six lawsuits in this District on the same patent family, stipulated to transfer of  
 24 numerous cases to this District, never previously contested personal jurisdiction in this District,  
 25 and had a meeting with the DJ plaintiff “regarding claims of infringement of patents in the same  
 26 family.” 506 F. Supp. 3d 947, 962-63 (N.D. Cal. 2020). No analogous facts are present here.

27 Because Red Hat has not (and cannot) meet its burden to plead the facts sufficient to show  
 28 that the “minimum contacts” prong of the specific jurisdiction analysis is met, it is unnecessary to

1 consider the “fair play and substantial justice” prong of the analysis.<sup>7</sup>

2 \* \* \*

3 The Court should therefore dismiss this case in its entirety for lack of personal jurisdiction  
4 under Federal Rule of Civil Procedure 12(b)(2). The dismissal should be granted *without leave to*  
5 *amend* because amendment would be futile. *See* Mot. at 14. Red Hat cannot plead facts to support  
6 general jurisdiction because, under controlling Supreme Court precedent, it cannot be said to be  
7 “at home” in California. *Id.* at 10-14. And Red Hat likewise cannot plead facts to support specific  
8 jurisdiction. VirtaMove lacks the requisite “minimum contacts” since the evidence shows that it  
9 has never directed any patent enforcement activities at this forum. *See supra* at 8-14.

#### 10 IV. CONCLUSION

11 For the foregoing reasons and those set forth in VirtaMove’s motion, the Court should  
12 dismiss this case in its entirety without leave to amend.<sup>8</sup>

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14  
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19 <sup>7</sup> It is however worth addressing Red Hat’s treatment of the second *Burger King* factor that is part  
20 of this prong, “the forum State’s interest in adjudicating the dispute.” *See Xilinx, Inc. v. Papst*  
21 *Licensing GmbH*, 848 F.3d 1346, 1355 (Fed. Cir. 2017). Red Hat claims that under this factor,  
22 “California has a substantial interest in *protecting its residents* from unwarranted claims of patent  
23 infringement.” Opp’n at 14 (quoting *Xilinx*, 848 F.3d at 1356) (emphasis added). That may be so,  
24 but it is undisputed that Red Hat is *not* a California resident. Compl. ¶6. Red Hat instead alleges  
that the Docker and Kubernetes technology “was developed and is maintained by companies that  
reside in this District.” Opp’n at 14. It does not explain how this is relevant to the second *Burger*  
*King* factor, and otherwise provides no authority that the location of development of third-party  
software is relevant to the personal jurisdiction analysis in a DJ action.

25 <sup>8</sup> In its opposition, Red Hat includes argument concerning its motion for leave to conduct  
26 jurisdictional discovery. Opp’n at 14-15. That argument is duplicative with that in Red Hat’s  
27 motion for jurisdictional discovery. *See* Dkt. No. 37. VirtaMove will address that motion in its  
28 soon-to-be-filed opposition to it, but in short jurisdictional discovery should be denied here  
because the evidence shows that there are no facts that Red Hat could discover that would allow it  
to sufficiently plead either subject matter or personal jurisdiction.

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